Supreme Court, U.S.
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No. 06-373

In The

Supreme Court of the United States

JEROME POWELL,

Petitioner,

v.

JOSEPH LEHMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Powell has been convicted of first-degree murder, files a notice of appeal and obtains permission to order the entire trial transcript at public expense, is he deprived of his right to appeal when his appointed appellate counsel orders and reviews only 54 pages (the pretrial hearings) of the trial transcript?

2. Was trial counsel ineffective when she failed to protect Powell from appearing before the jury in shackles and where she failed to properly investigate Powell's alibi defense?

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The opinion of the Ninth Circuit Court of Appeals is unpublished. *Powell v. Lehman*, 05-35532 (9th Cir. 2006). App. 1-5. A motion for rehearing en banc was denied on June 14, 2006. App. 71. In addition, Powell has attached the two relevant District Court orders. App. 6-49; App. 51-70.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Procedural History

Powell was found guilty of Murder in the First Degree after a jury trial in Pierce County, Washington. Following trial and conviction, an order of indigency was entered providing, in part, for "All portions of the verbatim transcripts . . . " Appointed appellate attorney Christopher Boutelle did not request a transcript of the entire trial. He requested only 54 pages of the trial transcript. The only issues raised on appeal were: (1) the Court's denial of the defense motion to dismiss for violation of speedy trial rights; (2) the Court's denial of the defense motion to dismiss for failure to join related defenses; and (3) the Court's denial of defense motion to dismiss for violation of right to be protected from double jeopardy. Boutelle did not discuss the assignments of error at trial with Powell's appointed trial attorney. The Washington appellate court affirmed Powell's conviction.

Subsequently, Powell filed a Personal Restraint Petition (Washington's form of a writ of habeas corpus). Powell's primary arguments were that both his trial and appellate counsel were ineffective. In regard to those claims, the Court of Appeals, Division II, granted an evidentiary hearing on two points. The court found that prior to trial, the prosecuting attorney and police had not made fingerprints lifted from the revolver available to the defense. Moreover, the court of appeals concluded that the record did not conclusively establish that slashing the

victim's throat caused the death. Thus, the court granted an evidentiary hearing in the Pierce County Superior Court on two issues:

1. what was the cause of death of the victim; and

2. whose fingerprints were on the revolver used to hit the victim on the back of his head.

Powell filed a timely petition for writ of habeas corpus in the Western District of Washington.[1] The District judge entered an Order that concluded, as to each of Powell's claims, the State court had not erred under the standard set forth in 28 U.S.C. § 2254(d). Despite this denial, the District Court did issue a certificate of appealability on two issues:

1. Whether petitioner's trial counsel was ineffective for failing to object to the State's improper closing argument, failing to object to the shackling, failing to investigate two critical witnesses, and failing to investigate the route to and from the murder scene.

2. Whether petitioner's appellate counsel was ineffective for failing to obtain the entire trial record and in failing to raise meritorious issues on review.

The Ninth Circuit Court of Appeals affirmed the denial of the writ. En banc review was denied.

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[1] Initially, the District Court concluded that Powell's petition was procedurally barred. That decision was reversed by the Ninth Circuit in *Powell v. Lambert*, 357 F.3d 871 (9th Cir. 2004).

Mr. Powell has served his sentence and been discharged from parole. But under Washington law "final discharge" from parole does not mean the end of a sentence. It simply signals the end of active parole supervision. See *In Re Quackenbush*, 142 Wash. 2d 928, 16 P.3d 638 (2001) (construing RCW 9.96.050). Because Mr. Powell's crime of conviction carries a maximum sentence of life in prison, as long as the conviction stands he is subject to return to prison.

2. Statement of Facts

On August 4, 1979, Charles Allison was murdered and his body dumped near the Green River in Washington State. The only question at trial was who had committed the murder. The State arrested Jerome Powell, Richard Razor, Donald Clark and others. By the time of trial, the State's case rested upon the testimony of Powell's two co-defendants.

When first contacted by the police as a suspect, Razor admitted that he had "played a minor role" in the murder. At trial, Razor testified that he, Allison, Donald Clark, Powell and others were at a Tacoma, Washington apartment on the evening of August 4th. While there, Powell hit Allison in the head with a .32 caliber pistol, told Razor to hold a gun on Allison, and instructed a woman to tie Allison's hands. According to Razor, he was outside the apartment talking with Clark when he saw Powell and Allison get into the Maverick and drive away. Clark and Razor followed them in Clark's car.

Razor carried a .38 and a knife. Razor was also allowed to plead guilty to manslaughter in exchange for his testimony.

Donald Clark also testified for the State. He described the route taken from Tacoma to the Green River area and the time the trip took. Clark said that Powell, while at the Green River area, asked for a pillow to muffle a shot and then asked for a knife. Clark gave him a bowie knife from his car trunk. Powell took Allison from the car into a wooded area. About 10-15 minutes later, Powell returned to the car. The knife was covered in blood and so were Powell's hands. Powell said he had cut Allison's throat and would take the blame for it. Clark put the knife in his car. When he returned home, Clark washed the knife and put it "in a box in the back room." The knife was in a leather sheath, which was taken into evidence. Clark "vaguely" remembered rinsing out the sheath.

When examined by the Washington State Crime laboratory no blood was found on the knife or sheath.

In exchange for his testimony, Clark was allc ed to plead guilty to manslaughter. The prosecutor also agreed to allow him to serve his time in the Pierce County Jail rather than prison.

The defense presented evidence that it was Razor and Allison who got into an argument. Razor pulled a .38 gun on Allison. In Tacoma, Razor struck Allison on the head with his gun and Allison began bleeding. Powell helped Allison into a car. According to Powell, he then left the group and went on his way. He never went to the Green River area where Allison's body was found and he never participated in any murder. The gun was not available for post-conviction examination because it had been destroyed by the State after trial.

In post-conviction proceedings Powell presented evidence that significantly undermined Clark's and Razor's

testimony. At an evidentiary hearing Powell demonstrated that trial counsel did not properly investigate the method of murder, a blow to the victim's head by a .22 caliber Clerke revolver. At the evidentiary hearing, John Eisele, M.D., the medical examiner who conducted the 1979 autopsy of Allison's body, testified that he was under the mistaken impression in 1979 that Clark, Razor, or another person had actually witnessed Powell slit the throat of Allison. Dr. Eisele relied heavily on this misinformation when he determined the cause of death in 1979. Therefore, the 1979 Death Certificate stated, and Dr. Eisele's 1982 trial testimony was, that the victim died from incised and stab wounds of the neck. When Dr. Eisele discovered his misunderstanding, he testified at the reference hearing that he could not determine the cause of Allison's death, except that it was from "violence of undetermined etiology." The State of Washington subsequently issued an amended Death Certificate in 1999 reflecting the cause of death. The amended Death Certificate was made a part of the State Superior Court record. This evidence completely contradicted Razor and Clark's testimony that Powell had stabbed the victim.

Trial counsel's failure to investigate the alternative cause of death is even more important given the evidentiary hearing testimony of Earl Sutherland. Sutherland testified that in 1979, at the time of the murder, Powell did not weigh enough to exert the strength necessary to result in the damage to the .22 Clerke revolver, which pierced the skull of the victim. In 1979, Powell was subaverage size at 155 pounds and 6'2" tall. In 1979, State's witness Clark was 5'9" tall and weighed 235 pounds; State's witness Razor was 6'6" tall and weighed 285 pounds.

There was other substantial evidence to support Powell's claim that he was not the murderer. Jessie Beard was not called by the State or the defense at Powell's 1982 trial. His testimony would have provided Powell with an alibi. Beard was not available, though he was properly subpoenaed, at the time of the reference hearing. Powell moved to have the transcript of Beard's 1994 interview, with accompanying affidavit of authenticity, accuracy, and voluntariness, admitted as his testimony. His motion was denied. However, the transcript of Beard's interview was admitted as an offer of proof as to what his testimony would have been.

Beard would have testified that he entered a plea to second-degree murder in regard to the death of Allison, although he did not kill him and had an alibi. Beard would have testified that he last saw Allison alive and leaving the 27th Street apartment. After Allison left, he and Powell went to a residence where they stayed and talked for the entire period of time during which the murder was alleged to have been committed.

Beard stated that he was returned to the Pierce County jail to testify at Powell's 1982 trial. Powell's trial counsel, however, never interviewed him. He said that had she done so, he would have told her that Powell had nothing to do with the murder.

A private investigator would have testified as to the timing of the round-trip route she traced from Tacoma to the Green River area. This route was clearly described by State's witness Donald Clark in his 1982 trial testimony. The time it took would have clearly shown that Powell

could not have been in the Green River area killing Allison when he was seen at the same time in Tacoma with Beard.

REASONS FOR GRANTING THE PETITION

In this case the Ninth Circuit Court of Appeals has entered a decision in conflict with the decision of this Court on two important matters – the right to the effective assistance of counsel on appeal and the right to the effective assistance of counsel at trial – including the right to have counsel fully investigate the case and to insure that the defendant appears before the jury free of shackles. On both points, the Ninth Circuit Court of Appeals failed to properly apply this Court's precedent to the facts.

1. This Court should find that appellate counsel's actions in reviewing only 54 pages of the transcript of a first-degree murder trial deprived Powell of his state court right to appeal and constituted ineffective assistance of counsel.

The Due Process Clause guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Claims of ineffective assistance of appellate counsel are reviewed according to the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989). Powell, therefore, must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, Powell would have prevailed on appeal. *Id.*

at 1434 & n.9 (citing *Strickland*, 466 U.S. at 688, 694). The Ninth Circuit determined that "even if appellate counsel did not order the entire trial transcript, Powell did not completely forfeit his right to appeal and so must show that he was prejudiced by the alleged deficiency." *Powell v. Lehman*, #05-35532 at 5; App. 4.

"[T]here can be no doubt that the State must provide an indigent defendant with a transcript when that transcript is needed for an effective defense or appeal." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971). *Accord, Mayer v. City of Chicago*, 404 U.S. 189, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971); *Williams v. Oklahoma City*, 395 U.S. 458, 89 S. Ct. 1818, 23 L. Ed. 2d 440 (1969); *Gardner v. California*, 393 U.S. 367, 89 S. Ct. 580, 21 L. Ed. 2d 601 (1969); *Roberts v. LaVallee*, 389 U.S. 40, 88 S. Ct. 194, 19 L. Ed. 2d 41 (1967); *Long v. District Court of Iowa*, 385 U.S. 192, 87 S. Ct. 362, 17 L. Ed. 2d 290 (1966); *Draper v. Washington*, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963); *Eskridge v. Washington State Board of Prison Terms*, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269 (1958); *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). This Court has also emphasized that these holdings are firmly rooted in both the due process and equal protection clauses of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. at 403-04.

It is clear that this Court regards access to a transcript as an essential element for ensuring that a criminal appellant has "an adequate opportunity to present his claims fairly in the context of a State's appellate process." *Id.* at 402. In fact, appellate counsel cannot withdraw from an appeal without doing far more than Powell's appointed counsel did in his case. *Anders v. California*, 386 U.S. 738,

87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), established the constitutional minimums that must be met before the court may release appellate counsel from his responsibilities. Driven by the concern that the appellate court dismiss counsel only if the appeal is in fact frivolous, *Anders* outlined the procedure binding upon both withdrawing counsel and the appellate court: If counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. The court, not counsel, then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

If a full review of the record, including review of the trial transcript is essential to an appeal, then counsel's failure to obtain the full record must be deficient performance. Appellate counsel, like trial counsel, has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In an appeal, the "investigation" consists of reviewing the entire transcript in order to determine which issues can be raised on appeal and which issues either cannot or should not be raised. *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988) (holding that a failure to investigate possible evidence of defendant's mental condition could not be deemed a trial tactic where the lawyer did not view relevant documents that were available). It is true that this Court has held that appellate counsel has no obligation to raise every possible claim on appeal. See *Jones v. Barnes*, 463 U.S. 745, 751-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). But this is not a case where appellate counsel carefully reviewed the trial court

record and, after fully researching the case, raised only the best issues. Here, counsel could not exercise judgment on issues he didn't even know existed. Counsel raised only those issues found in the very small part of the transcript he actually reviewed. In this case, appellate counsel could not have discharged the fundamental duty to investigate the potential issues on appeal without the entire trial transcript.

Analysis of this issue might be different if appellate counsel had also represented Powell at trial or if he had actually consulted with trial counsel about the available issues. In that situation, reliance on *Jones v. Barnes*, *supra*, might have some validity because, having been present at trial or spoken with trial counsel, appellate counsel would know what issues were preserved for review. But he did neither. Thus, his performance was deficient.

The actions of Powell's attorney had the same effect as failing to file a notice of appeal altogether. Thus, Powell should not have to demonstrate prejudice. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L. Ed. 2d 985 (2000). The failure to obtain and review all of the trial transcript when the defendant has filed a notice of appeal cannot be deemed strategic. Like filing a notice of appeal, ordering the entire transcript is a purely ministerial task.[2]

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[2] Under Washington law, a criminal defendant is "constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims." *State v. Thomas*, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)). In this case, the trial court had approved transcription of the entire trial at public expense.

The failure to review the entire trial transcript effectively deprived Powell of his right to appeal without his consent.

If Powell must demonstrate prejudice, he has done so. When his appellate counsel failed to raise the issues of shackling, prohibition of cross-examination and prosecutorial misconduct on direct appeal, Powell was deprived of the far more favorable standard of review afforded an appellant. Instead, because he was forced to raise those issues in a collateral attack, the Washington Appellate court applied its higher standard of proof for collateral attacks, requiring Powell to demonstrate actual and substantial prejudice. Had Powell raised the issues on appeal, he would likely have prevailed. See, e.g., *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999) (reversing because the defendant was shackled); *State v. Padilla*, 69 Wn. App. 295, 846 P.2d 564 (1993) (reversing because prosecutor asked defendant to comment on the truthfulness of state's witnesses); *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003) (reversing because prosecutor vouched for the credibility of the witnesses); *State v. Brooks*, 25 Wn. App. 550, 611 P.2d 1274 (1980) (reversing because court restricted cross-examination of co-defendant).

This was not a strong case and the State's theory depended entirely on the testimony of Powell's two co-defendants who had much to gain by deflecting police scrutiny onto Powell. Applying the more lenient direct appeal standard of harmless error, the Washington appellate courts would likely have reversed Powell's conviction. Powell has demonstrated that he was prejudiced.

2. This Court should hold that failure to protect Powell from appearing before the jury in shackles and failing to investigate the facts and circumstances of the crime deprived Powell of his right to the effective assistance of counsel at trial.

a. Shackling

Shackling during trial violated Powell's right of due process and his right to a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution, requiring reversal of his conviction and sentence. In *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), this Court first addressed the issue of shackling. In *Allen*, the Court recognized two "inherent disadvantages" to shackling a defendant at trial: physical restraints may not only cause the jury prejudice and impair the presumption of innocence, they may also detract from the dignity and decorum of the proceeding and impede the defendant's ability to communicate with his counsel. *Id.*

Building on that decision in *Holbrook v. Flynn*, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), this Court considered the issue of "whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." Although the court did not find the use of uniformed security personnel to rise to the level of shackling, it did set forth again its basic holding of the use of shackling: that a prisoner brought into court is entitled to appear free from all bonds or shackles. And shackles should never be permitted except to prevent the escape of

the accused, to protect everyone in the courtroom, and to maintain order during the trial. This Court reaffirmed all of its prior precedent on this issue in *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (May 23, 2005). Specifically, the Court held,

> [T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.

Id. at 2012. The Court then considered whether shackling during the "penalty phase" of a capital trial made a constitutional difference. *Id.* The Court reiterated the need for courts to restrain dangerous defendants, but concluded that, "given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Id.* at 2013. This Court concluded, "The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases," even though the presumption of innocence no longer applies, because of the significance and finality of the sanction that the jury is considering in that phase. *Id.* at 2014.

In *Deck*, the Court granted relief because the record showed that the jurors were aware of the defendant's restraints; the trial court record contained no formal or informal findings justifying the restraints, such as a risk

of escape or a threat to courtroom security, or explaining why the chosen restraints were necessary; and the shackling of the defendant was "inherently prejudicial," so that it could not be upheld without adequate justification. *Id.* at 2015-16.

There was no explanation as to why shackling Powell would have protected anyone from forces outside the courtroom. What record exists suggests that the trial court relied on nothing more than rumors and hearsay regarding potential problems. But prior to trial, Powell had not been disruptive nor had he tried to escape. Because the hearing was *in camera*, there were no formal or informal findings made by the trial court. There is evidence that the jurors knew of the restraints because the trial judge mentioned the security arrangements to the jury at least twice.

In the record, the trial prosecutor states that "the defense responded to the security concerns by discounting the seriousness of the threats. To the best of my recollection, the defense did not impose any formal legal objection to the security measures." Thus, the prosecutor indicates that there was a *factual* objection, i.e., that the facts did not support the conclusion that Powell should be shackled. That is good enough to preserve the issue.

But, even if trial counsel did not object, that failure was clearly deficient performance. There is no strategic reason to allow a person on trial for murder to appear before the jury in chains. As evidence of this, neither the appellate court nor the Respondent even attempts to justify this decision by counsel on strategic grounds.

In the habeas context, shackling is harmless unless the petitioner shows that the physical restraints "had

substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). "If we are in 'grave doubt' whether the error affected the verdict, the error is not harmless." *Duckett v. Godinez*, 67 F.3d 734, 748, 749 (9th Cir. 1995) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)). The prohibition against shackling is premised on the fact and that it deprives the defendant of the presumption of innocence. The jury, seeing the defendant in chains, is likely to assume in a murder prosecution that the defendant is so violent he cannot be trusted to appear at trial without restraint and must, in fact, be guilty of the charged violence as well.

b. Failure to Investigate

Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. When it became clear that Powell's defense was alibi, trial counsel failed to make the proper investigation and this prejudiced Powell's defense.

"A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) citing *Strickland*, at 690. Even mindful of the deference reviewing courts owe

counsel's trial strategy, the Ninth Circuit has nevertheless concluded that counsel's cursory investigation of the three possible alibi witnesses and subsequent failure to put them on the stand, constituted deficient performance that was prejudicial to the petitioner's defense. *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999); see also *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994).

This Court should conclude that the failure to properly investigate the witnesses who would have supported Powell's alibi and the failure to introduce the evidence at trial constituted deficient performance. Counsel failed to fulfill her duty to investigate Powell's most important defense witnesses. *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (holding that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary").

Here, potential defense witnesses, Beard in particular, would have corroborated Powell's alibi defense. Beard was returned from prison to the Pierce County jail before Powell's trial but trial counsel did not even interview him – an eyewitness to the events. Had she done so, she would have learned that Beard would have supported Powell's claim of innocence.

There can be no strategic excuse for her failure to investigate. And, as argued above, under the facts of this close case, there is ample prejudice that this failure was prejudicial to Powell's defense.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted this 12th day of September, 2006.

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Admitted to Supreme Court
Bar, 5/17/93

177 Fed.Appx. 711

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME POWELL, Petitioner-Appellant, v. JOSEPH D. LEHMAN, Respondent-Appellee.	No. 05-35532 D.C. No. CV-00-05672-RJB MEMORANDUM* (Filed Apr. 24, 2006)

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted April 5, 2006
Seattle, Washington

Before: CANBY, GOULD, and BEA, Circuit Judges.

Defendant Jerome Powell, a prisoner of the State of Washington, appeals the district court's denial of his federal habeas petition. Powell was convicted in 1982 in state court of murder in the first degree.[1] Because we conclude that none of Powell's claims presents reversible

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[1] Because the facts are familiar to the parties, we do not recite them here except as necessary to clarify our decision.

error, we affirm the district court's denial of the habeas petition.

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Powell is not eligible for habeas relief unless the decision of the state appellate court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). For his claims of ineffective assistance of counsel, Powell must show that his counsel's performance was deficient and "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Powell must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also id.* at 697 (noting that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies").

We must reject all of Powell's claims on appeal in light of the restrictive AEDPA standard that limits circumstances by which a state prisoner may gain relief in a federal habeas petition. First, Powell did not receive ineffective assistance from trial counsel's failure to object to the shackling of Powell during trial. "The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." *Deck v. Missouri*, 125 S.Ct. 2007, 2010 (2005). Despite the risk of jury prejudice and other possible difficulties to the defendant, the Supreme Court has accepted that "[t]here will be cases, of course, where these perils of shackling are unavoidable." *Id.* at 2014

("We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations.").

The state appellate court did not apply *Strickland* unreasonably when it determined that Powell's trial counsel was not deficient in consenting to shackling in the face of specific evidence of danger to the courtroom processes. The state appellate court could reasonably conclude that Powell's state court trial counsel could not have raised a meritorious legal objection to shackling, in light of the specific information that an escape attempt was planned to free Powell during his trial. Moreover, the state trial judge took precautions to minimize or eliminate any jury prejudice by hiding the fact that Powell was shackled. To the extent the state trial court did not state the relevant facts on the record, an objection by trial counsel in all probability would have resulted in the trial court curing any defect with appropriate findings on the record, and Powell has not shown prejudice from the lack of findings more formal than the trial court's recital that there was a need for shackling.

Second, Powell contends that he received ineffective assistance from improper vouching during the prosecution's closing argument. We "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Trial counsel may properly decide to "refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality." *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991). The prosecutor's comments

about the witnesses' credibility were not egregious, did not rely on inadmissible evidence, and paralleled similar statements that were subsequently made in defense counsel's closing argument. We conclude that trial counsel's inactions in not objecting to prosecutor's closing argument were not deficient and that any improper comments by the prosecutor in argument did not undermine confidence in the trial's outcome.

Third, Powell did not receive ineffective assistance from trial counsel's failure to investigate the route to the murder scene. The proposed testimony of the time necessary to drive the route was cumulative and was derived from testimony offered by the prosecution. The failure to investigate was not objectively unreasonable, and did not undermine confidence in the outcome of the trial.

Fourth, Powell did not receive ineffective assistance of trial counsel from the failure of state trial counsel to investigate two potential witnesses. Judy McDonald was not present at the critical periods of the crime and could not provide helpful exculpatory testimony. Jessie Beard's proposed testimony was highly inconsistent with Powell's testimony at trial. In the light of the marginal probative or corroborative value of this evidence, the failure to investigate or offer the witnesses' testimony did not undermine confidence in the outcome of the trial and therefore was not prejudicial.

Finally, Powell has not sufficiently alleged prejudice from his appellate counsel's failure to raise additional issues on appeal. Even if the appellate counsel did not order the entire trial transcript, Powell did not completely forfeit his right to appeal and so must show that he was prejudiced by the alleged deficiency. *See Roe v. Flores-Ortega,* 528 U.S.

470, 484 (2000) (presuming prejudice only when "counsel's deficient performance actually cause[d] the forfeiture of the defendant's appeal"). A claim of ineffective assistance of counsel on direct appeal would have been unlikely to result in reversal based only on the trial record. *See State v. McFarland,* 127 Wash.2d 322, 338, 899 P.2d 1251, 1258 (Wash. 1995). Powell's state trial counsel did not make a timely objection on the record to the other trial errors asserted in the briefing, which were improper shackling, prohibition of cross-examination, and prosecutorial misconduct, and these asserted errors would not have likely resulted in reversal under plain error review. Powell contends that there was prejudice because the plain error review in state court would have been more lenient than the AEDPA standard in this habeas case. We reject that argument. To demonstrate prejudice from ineffective assistance of state appellate counsel, Powell must assert a claim that would have likely resulted in a reversal in the state appellate court under the plain error standard of review. Because he has not done so, the state appellate court could reasonably conclude that there was no prejudice under *Strickland.* The district court correctly held that the state appellate court did not unreasonably apply precedent of the United States Supreme Court within the meaning of AEDPA.

AFFIRMED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME POWELL, Petitioner, v. JOSEPH LEHMAN, Respondent.	Case No. C00-5672RJB ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (Filed April 27, 2005)

This matter comes before the court on the Report and Recommendation of the Magistrate Judge. Dkt. 54. The court has reviewed the entire record de novo.

PETITION FOR WRIT OF HABEAS CORPUS

In this petition for writ of habeas corpus, petitioner alleges that his constitutional rights were violated because he received constitutionally deficient representation at trial and on appeal, and that he should have been afforded the opportunity in the state court reference hearing to present evidence regarding the cause of the victim's death. Dkt. 1, Attachment at 4-5. Petitioner also requests an evidentiary hearing so that he can develop facts regarding ineffective assistance of his trial and appellate counsel, and regarding the cause of the victim's death. *Id.* at 5.

PROCEDURAL HISTORY

Petitioner pleaded guilty to first degree murder and first degree kidnaping on October 2, 1979. A motion to withdraw the guilty plea was denied, but that decision was reversed on appeal. On remand, Petitioner pleaded not guilty, but was found guilty of first degree murder after a

jury trial. Petitioner appealed, and the conviction and sentence were affirmed on May 31, 1983. *State v Powell*, 34 Wn. App. 781 (1983). In his motion for review to the Washington Supreme Court, petitioner argued that (1) his right to speedy trial was violated under Washington CrR 3.3; (2) his right to joinder of a related issue was violated under Washington CrR 4.3(c)(3); and (3) his right against double jeopardy was violated by the filing of an amended information. Dkt. 21, Exh. 5, at 1-2.[1] The Washington Supreme Court denied review on January 6, 1984. *State v Powell*, 100 Wn. 2d 1035 (1984).

On October 24, 1990, Petitioner filed his first state collateral attack with the Court of Appeals for the State of Washington. *Id.*, Exh. 6. In his personal restraint petition, he challenged decisions of the Indeterminate Sentence Review Board (ISRB), but did not challenge his underlying conviction. *Id.* The petition was consolidated with a second petition that also challenged ISRB actions. *Id.*, Exh. 8. On December 4, 1991, the Washington Court of Appeals denied the consolidated petitions. *Id.*, Exh. 10. Petitioner then filed a motion for review with the Washington Supreme Court, which was denied, as was a motion to modify. *Id.*, Exhs. 14 & 17.

On September 6, 1996, petitioner filed a third personal restraint petition with the Washington Court of Appeals, raising the claims that are relevant to this petition for writ of habeas corpus. *Id.*, Exh, 18. In that

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[1] As the state court record (Dkt. 21) was unable to be located, counsel for respondent was directed to resubmit a copy of the state court record (*see* Dkt. 53), which was received on December 3, 2004. This copy was not assigned a new docket number and retains the designation of Docket 21 in this case.

personal restraint petition, petitioner raised the following issues:

> 1. A violation of his right to effective assistance of trial and appellate counsel, as guaranteed by the V, VI, and XIV Amendments of the U.S. Constitution and Article 1, §§ 3 and 22 of the Washington State Constitution;
>
> 2. A violation of his right to a fair trial, as guaranteed by the V, VI, and XIV Amendments of the U.S. Constitution and Article 1 §§ 3 and 22 of the Washington State Constitution; and
>
> 3. Undue delay in his consideration for parole by the ISRB because he is not being credited with his pre-conviction jail time, as required by *State v. Phelan*, 100Wn.2d 508, 671 P.2d 212 (1983) and guaranteed to him by the U.S. Constitution, Amend. V. and Article 1, § 3 of the Washington State Constitution.

Id., Exh. 18 at 25-26.

The Washington Court of Appeals directed the superior court to hold a reference hearing. Following the reference hearing, the superior court concluded that petitioner received a fair trial. *Id.*, Exh. 25. Based on the Superior Court's Findings of Fact Re: Reference Hearing, the Washington Court of Appeals dismissed the petition on January 10, 2000. *Id.*, Exh. 26.

On January 28, 2000, Petitioner filed a motion for discretionary review with the Washington Supreme Court. Dkt. 21, Exh. 28. On March 17, 2000, the Commissioner of the Washington Supreme Court found the petition to be untimely and therefore procedurally barred under R.C.W. 10.73.090 and 10.73.130. *Id.*, Exh. 30. The Commissioner

also found that the Court of Appeals had erred in considering the petition as it was procedurally barred. Petitioner filed a motion to modify the commissioner's ruling on April 11, 2000, which was denied on June 6, 2000. *Id.*, Exhs. 31 & 36.

Petitioner filed his federal habeas corpus petition November 14, 2000. The petition was dismissed by this court as being procedurally barred. Dkts. 28 & 29. That decision was appealed and the Ninth Circuit has remanded with the instruction that "to the extent that Powell's federal claims were contained in his state personal restraint petition filed in 1996, Powell has exhausted his state remedies." *Powell v. Lehman*, 357 F. 3rd 871, 880 (9th Cir. 2004).

The petition will therefore be considered on the merits to the extent indicated by the Ninth Circuit.

FACTUAL HISTORY

Washington Court of Appeals summarized the facts surrounding petitioner's conviction as follows:

> In early August 1979, a group alternatively called "The Bullets" and "The Family" took Charles Allison, the victim, to a secluded area near Kent, where he was murdered. Jerome Powell was a member of this group. According to the other group members, all of whom pled guilty to lesser offenses, Powell went into some bushes where the victim lay bound and returned a short time later with a blood covered knife.
>
> On August 10, 1979, the State charged Powell with first degree felony murder and first degree kidnapping (sic). On October 2, 1979, the first

day of trial, he pled guilty to first degree murder. But before sentencing, he moved to withdraw his plea, but the trial court denied the motion. Powell appealed. This court set aside Powell's guilty plea because the record did not contain sufficient factual basis to sustain the plea and remanded the case to the trial court for entry of a plea. *See State v. Powell*, 29 Wn. App. 163, 627 P.2d 1337 (1981).

Upon remand, the State charged Powell by an amended information with first degree murder. Powell pled not guilty. At trial, the State argued that Powell committed the murder by slitting the victim's throat and in support presented considerable circumstantial evidence. This evidence included extensive testimony from other members of Powell's group and physical evidence of the alleged crime, including photographs of the victim's body and a knife with its sheath, which the State asserts was the murder weapon.

In response, Powell contended the victim's death was not caused by slitting of his throat, but rather by a blow to the victim's head delivered by one of the other group members with a revolver. But while Powell's initial appeal was pending, a prosecutor, Tom Dinwiddie, who was not assigned to the case, mistakenly authorized destruction of some physical evidence from Powell's case, including the revolver allegedly used to strike the victim's head and the knife and sheath. Dinwiddie authorized the destruction in April 1981, before this court remanded Powell's case. As Dinwiddie testified at the 1982 trial, he gave the authorization believing the evidence belonged to one of his own cases.

> The jury found Powell guilty of first degree murder. The trial court sentenced Powell to a maximum life sentence with a mandatory minimum sentence of 20 years. Powell appealed his conviction. This court affirmed his conviction, *State v. Powell*, 34 Wn. App. 791, 664 P.2d (1983), *review denied*, 100 Wn.2d 1035 (1984), and also denied Powell's motion for reconsideration.

Dkt. 21, Exh. 3.

STANDARD FOR HABEAS REVIEW

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). A determination of a factual issue by a state court shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

STANDARD FOR EVIDENTIARY HEARING

Under 28 U.S.C. § 2254, if a habeas applicant has failed to develop the factual basis for a claim in state court, an evidentiary hearing may not be held unless (A) the claim relies on (1) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, or (2) a factual predicate that could not have been previously

discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. §2254(e)(2)(A) and (B).

In *Insyxiengmay v. Morgan*, 2005 WL 712483, *10-11 (9th Cir. Wash. 2005), the Ninth Circuit set out the process for determining whether an evidentiary hearing is warranted under 28 U.S.C. § 2254:

> Under the amended statutory scheme, a district court presented with a request for an evidentiary hearing . . . must determine whether a factual basis exists in the record to support the petitioner's claim. If it does not, and an evidentiary hearing might be appropriate, the court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has "failed to develop the factual basis of a claim in State court." If so, the court must deny a hearing unless the applicant establishes one of the two narrow exceptions set forth in section 2254(e)(2)(A) & (B). If, on the other hand, the applicant has not "failed to develop" the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under *Townsend* [*v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)]. *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999). In *Townsend*, the Supreme Court concluded that a defendant is entitled to a federal evidentiary hearing on his factual allegations if: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole;

> (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. 372 U.S. at 313. Assuming that the petitioner has not failed to develop his claim and can meet one of the *Townsend* factors, "[a]n evidentiary hearing on a habeas corpus petition is required whenever petitioner's allegations, if proved, would entitle him to relief." *Turner v. Marshall*, 63 F.3d 807, 815 (9th Cir.1995) (citations omitted). [FN6] The petitioner's allegations need only amount to a colorable claim. *See Beaty v. Stewart*, 303 F.3d 975, 993 (9th Cir.2002) (citing *Townsend*, 372 U.S. at 313); see also, *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir.2001) ("Where a petitioner raises a colorable claim [to relief], and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."). In sum, for a post-AEDPA petitioner to receive an evidentiary hearing in federal court, he must first show that he has not failed to develop the factual basis of the claim in the state courts: if he has failed, he must meet one of the two narrow exceptions stated in the statute. *See* 28 U.S.C. § 2254(e)(2)(A)-(B). Then he must meet one of the Townsend factors and make colorable allegations that, if proved at an evidentiary hearing, would entitle him to habeas relief.

Insyxiengmay v. Morgan, 2005 WL 712483, *10-11 (9th Cir. Wash. 2005). Under AEDPA, "a failure to develop the factual basis of a claim is not established unless there is a

lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at *11, citing *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

CLAIMS AND ARGUMENTS

Petitioner sets forth three grounds supporting his petition for habeas relief. First, petitioner contends that his appellate counsel was constitutionally deficient because he did not order the entire trial transcript, and, as a result, meritorious issues were not raised on appeal. Petitioner contends that, had these issues been raised, he would have been entitled to a more favorable standard of review than he received when he raised the same issues in a personal restraint petition. Second, petitioner claims that his trial counsel was deficient in agreeing to have petitioner shackled in front of the jury, in failing to object to the prosecutor's improper cross examination of petitioner, in failing to object to prosecutor's improper statements as to his personal opinion of the credibility of the witnesses, in failing to investigate petitioner's alibi witnesses by not interviewing Judy Hampton McDonald and Jessie J. Beard and not investigating the route to the scene of the crime, and in not bringing pretrial motions in limine to exclude irrelevant prejudicial evidence. Third, petitioner claims that if he had had the opportunity at his state court reference hearing of calling three witnesses, and that, had he presented testimony from these witnesses, he would have proven that he did not cause Mr. Allison's death. In his objections to the Report and Recommendation, petitioner contends that the Report and Recommendation fails to address the issue of whether he was denied the right to confront and cross-examine his codefendant. Dkt. 55, at 12-13.

In his response to the objections, respondent contends that (1) petitioner has failed to show that trial counsel's representation was unreasonably deficient and prejudicial; (2) petitioner has failed to show that appellate counsel was deficient and prejudicial; and (3) petitioner's confrontation and cross-examination claims was not raised in the habeas petition. Dkt. 56.

DISCUSSION

1. Ineffective Assistance of Trial Counsel

In order to establish ineffective assistance of counsel, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficient performance affected the result of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. In order to demonstrate prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Under the first prong of the *Strickland* test, the question is whether counsel's assistance was reasonable under the totality of the circumstances, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690. To succeed under the first prong, the petitioner must show the attorney's conduct reflects a failure to exercise the skill, judgment, or diligence of a reasonably competent

attorney. *United States v. Vincent*, 758 F.2d 379, 381 (9th Cir.), *cert. denied*, 474 U.S. 838 (1985).

Under the second prong, the petitioner must demonstrate prejudice, that but for counsel's unprofessional errors, the result would have been different. *Strickland*, 566 [sic] U.S. at 694. However, sheer outcome determination is not sufficient to make out a Sixth Amendment violation; a proper prejudice inquiry focuses on whether counsel's errors or omissions rendered the proceeding fundamentally unfair or the result unreliable. *Lockhart v. Fretwell*, 113 S.C. 838, 842-44 (1993).

A. Trial counsel's ineffectiveness in failing to object to prosecutor's improper cross examination of petitioner

Petitioner claims that his trial counsel was ineffective for not objecting when the prosecutor asked petitioner to comment on whether other witnesses lied. The Magistrate Judge did not address this claim in the Report and Recommendation. The claim was arguably exhausted in state court, but the state court declined to reach the merits of the claim. The court will address the merits of the claim here.

The prosecutor asked the following questions on cross-examination of petitioner:

Q. And you didn't go to Kent that morning?

A. No.

Q. You didn't ask Donald Clark for a knife?

A. No.

Q. And you didn't cut Charles Allison's throat?

A. No.

Q. So the people that have been her [sic] during this trial and have said that you did are lying?

A. Yes, they are.

Dkt. 3, File 2, Vol. III at 494.

Petitioner claims that his trial counsel should have objected to the last question. However, his counsel asked petitioner the same question on direct examination:

Q. You heard the testimony that you went up to the Green River Road and slit Charles Allison's throat. Is that true?

A. No.

Q. Did you kill Charles Allison?

A. No.

Q. Did you ask anyone else to kill Charles Allison?

A. No.

Id., Vol. III at 485.

Petitioner's trial counsel also asked him on direct examination whether testimony that he was second in command in a gang led by his brother was true, and he responded that it was not. *Id.*, Vol. III at 468.

At the end of cross-examination, the prosecutor asked petitioner the following question: "So the people that have been her [sic] during this trial and have said that you did are lying?" Petitioner responded: "Yes, they are." *Id.*, Vol. III at 494.

In determining whether counsel's representation fell below an objective standard of reasonableness, the reviewing court will defer to counsel's strategic decision to present, or to forgo, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 689; *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995); *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied* 489 U.S. 1046 (1989; *Campbell v. Kincheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied* 488 U.S. 948 (1988).

In this case, where credibility of the witnesses was central to the case, the decision of petitioner's trial counsel to ask petitioner whether testimony of the inculpating witnesses was true was a reasonable strategic decision related to the defense's theory of the case. Because petitioner's counsel raised the credibility issue by eliciting testimony on direct examination, there was no error in the prosecutor's cross-examining petitioner on the issue. If anything, trial counsel's decision not to object to the questions on cross-examination emphasized the credibility issues that she had wanted to raise to the jury. Further, if trial counsel had objected to the prosecutor's question on cross-examination, she likely would have been overruled, since the door had been opened on direct examination. Accordingly, trial counsel's failure to object to the prosecutor's cross-examination did not fall below an objective standard of reasonableness, nor did any failure to object to those statements affect the result of the proceeding. This claim does not warrant habeas relief.

B. Trial counsel's ineffectiveness in failing to object to prosecutor's improper statements in closing argument in which he expressed his personal opinion of the credibility of the witnesses

Petitioner maintains that the prosecutor improperly vouched for and against witnesses in the closing argument.

In reviewing this claim, the Washington Court of Appeals concluded as follows:

> Powell next contends that his trial counsel was deficient in failing to object to prosecutorial comments regarding witness credibility and to misstatements of facts during closing argument. Powell's contention is without merit.
>
> A prosecutor may not offer a personal opinion regarding a witness' veracity, but may comment on witness credibility. *State v. Neidigh*, 78 Wn.App. 71, 74, 895 P. 2d 423 (1995). Our review of the State's closing argument discloses that counsel gave his opinion regarding that counsel gave his opinion regarding testimony from several witnesses by stating that a particular witness "is entirely credible" or "is the only credible witness," while other times stating that testimony is "entirely fanciful" or "completely transparent." These remarks were more than just comment on witness veracity. They were estimations and conclusions about the ultimate worthiness of the testimony. Thus, in failing to object to the prosecutor's opinions, defense counsel performed deficiently. Nonetheless, Powell does not demonstrate that this error was prejudicial, that is, but for this deficiency, the jury would have returned a different verdict, particularly in light of

> substantial testimony from other witnesses and other circumstantial evidence inculpating Powell. Powell's contention fails.
>
> The prosecutor also made comments regarding the cause of death and Powell's whereabouts on the evening of the murder. These comments were based upon the testimony of several witnesses and were reasonably drawn form [sic] the evidence. *See Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)(in closing argument, prosecution has wide latitude in drawing and expressing reasonable inferences from evidence); *State v. McFarland*, 73 Wn.App. 57, 65, 867 P.2d 660 (1994)(comments reasonably inferred from evidence do not constitute improper opinion). Defense counsel did not perform deficiently by failing to object.

Dkt. 21, Exh. 3 at 8-9.

The relevant question in evaluating whether prosecutorial misconduct warrants habeas relief is whether the misconduct denied the defendant a fair trial. Prosecutorial misconduct would deny a defendant a fair trial if the comments so infected the trial with unfairness as to make the resultant conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Improper remarks must be viewed in context, considering the probable effect they may have had on the jury's ability to decide the case fairly. *United States v. Young*, 470 U.S. 1, 11-12 (1985).

It is improper for the prosecution to vouch for the credibility of a government witness. *United States v. Roberts*, 618 F.2d 530,533 (9th Cir.1980), *cert. denied*, 452 U.S. 942 (1981); *United States v. Potter*, 616 F.2d 384, 392 (9th Cir.1979), *cert. denied* 449 U.S. 832 (1980); *United*

States v. Davis, 564 F.2d 840, 866 (9th Cir.1977), *cert. denied* 434 U.S. 1015 (1978). Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony; or the prosecution may make remarks that bolster a witness's credibility by reference to matters outside the record. *U.S. v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996). However, a prosecutor's assertions regarding the relative believability of the state and defense witnesses are not objectionable if they were inferences drawn from the evidence, and not representations of the prosecutor's personal opinion. *Duckett v. Godinez*, 67 F.3d 734, 742 (1995).

The court has carefully reviewed the closing arguments in this case and will discuss all statements the prosecutor made that would arguably be relevant to his claim that the prosecutor violated his constitutional rights be [sic] expressing his personal opinion of the credibility of the witnesses.

– "You folks have heard a lot of testimony from the stand, some of it extremely contradictory, some of it I would characterize as outright lies. You are going to have to think about what you heard, what you saw, the way that people testified, the totality of the evidence you heard." Dkt. 3, File 2, Vol. III at 504. The prosecutor's characterization of testimony as outright lies is an inference drawn from the evidence and does not constitute improper vouching.

– "Stella Louis' testimony, I would submit to you, is entirely credible. [sic] Dkt. 3, File 2, Vol. III at 507. "But I would submit that certainly given the peculiar nature of

the hemming and apparently the controversy it caused between Ms. Louis and Mr. Allison, the identification is very good." *Id.* at 508. "Their testimony, I would submit to you, is entirely credible." *Id.* "Tiny Razor, we would submit, is the only credible witness, at least based on what's transpired in this trial, as to the full events of what took place in the apartment." *Id.* at 513. "Well, I would submit to you that's exactly the case with Tiny Razor and Donald Clark. [sic] *Id.* at 519. "And I would submit to you it's entirely fanciful." *Id.* at 520. "Janet Linton, I would submit, based on what you have heard, is an out and out liar." *Id.* These comments were offered as propositions to the jury, who were the decisionmakers. As such, the comments were offered as argument, and they were not improper comments that vouched for the credibility of a witness. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Ed. 2000 ("Submit: 1. To yield or surrender (oneself) to the will or authority of another. 2. To subject to a condition or process. 3. **To commit (something) to the consideration or judgment of another**. . . . 4. **To offer as a proposition or contention: *I submit that the terms are entirely unreasonable.***") (emphasis added).

– "Now those four people, I think, have stories that jive [sic]." Dkt. 3, File 2, Vol. III at 508. "I think, based on what you saw, Robert Razor is not a criminal mastermind." *Id.* at 518. [sic] I think that's entirely consistent with Tiny Razor and I'd ask you people to search your memories and what you thought about this man when he was on the stand." *Id.* at 538. The only objectionable part of these statements is the phrase "I think." The statements themselves were made in the context of argument and were inferences from the evidence. Furthermore, counsel reminded the jury of the court's

instructions and reinforced that the jurors were the sole judges of credibility. *Id.* at 504. It is clear that no evidence regarding what the prosecutor thinks or feels was presented. To the extent that these statements may have been objectionable, they did not affect the jury's ability to decide the case fairly.

The words "I think" probably weaken an argument rather than strengthen it; the argument would have been more forceful without those two arguably objectionable words. And, of course, from the jury's standpoint, all of what a lawyer argues appears to be what the lawyer thinks, whether the statements begin with "I think," or not. Nonetheless, in this case, the prosecutor's use of the words "I think" does not amount to inappropriate vouching.

– "I think this woman's biases, her prejudices, and if you will, her outright lies are completely transparent. I don't think any of you folks were taken in by it. I certainly would hope that was not the case." Dkt. 3, File 2, Vol. III at 521. The first sentence of this passage is an inference from the evidence. To the extent that the prosecutor expressed improper personal opinion in the second and third sentences, any such inference was obviated by a later statement the prosecutor made in summation: "Counsel gave you a litany of reasons why people might lie and that's fine. Everyone has motives. There are reasons. As I have indicated those are credibility questions. Those are things you are going to have to resolve." *Id.* at 541.

– "Obviously I had met Mr. Woods at the interview we talked about, a nice enough fellow, an honest fellow. I certainly would not characterize him as sitting here lying in this witness chair. He wasn't." *Id.* at 521. To the extent that this statement is objectionable as expressing the

prosecutor's personal opinion of Mr. Woods, it did not affect jury's ability to decide the case fairly, since the statement actually helped the defense.

– "Now if Tiny Razor is a criminal mastermind, Ladies and Gentlemen, would he be out there getting ready to take on Tacoma Police Force and for all he knows the state patrol and the sheriff's office and the rest of the world with a shotgun? I think that idea is ludicrous. I think if all of you call upon your experiences as people and you remember the trouble Tiny Razor was having on this stand, you are going to conclude that he was pretty much what you saw." *Id.* at 538. The prosecutor's statement that the idea is ludicrous is argument based upon a reasonable inference from the evidence. In addition, the prosecutor emphasized that the jurors were the decisionmakers.

– "Well, first of all, I don't have a lot of trouble with that. It's entirely conceivable in my mind that Tiny Razor may have said that. He is exactly the sort of person who, at least I formed an impression of him, would have in that sort of a situation jumped up and been part of the group. He is a lemming. He is going to go along with the pack, if there is a fight going." *Id.* at 540. This statement, taken as a whole, is a argument based upon a reasonable inference from the evidence. While the prosecutor's statement that he had formed an impression of Mr. Razor may have been objectionable, based on the context of the statement, it did not affect the jury's ability to decide the case fairly.

– "It's entirely conceivable that Tiny Razor jumped up and said, "Don't move, I'll blow your head off." I think he is that sort of individual. He is a blowhard, if you will, and he may very well have done it." Dkt. 3, File 2, Vol. III at 540. This statement, taken as a whole, is a argument

based upon a reasonable inference from the evidence. While the prosecutor's statement that he thought Mr. Razor was "that sort of individual" may have been objectionable, based on the context of the statement, it did not affect the jury's ability to decide the case fairly.

The prosecutor's argument, viewed in its entirety, was based upon the evidence adduced at trial and inferences from that evidence. Some of the prosecutor's statements were inartful, and some of them may have approached the line of objectionable argument. Nonetheless, it was clear from the argument that it was the province of the jury to make the credibility determinations.

The court concurs with petitioner that credibility of witnesses was pivotal in this case, and that petitioner had presented evidence contradicting the State's witnesses. Even the strategy of petitioner's trial counsel appears to have been to attack the credibility of the inculpating witnesses and to bolster petitioner's credibility. Nonetheless, the few remarks of the prosecutor, in a long argument that carefully reviewed the evidence, that may have been objectionable did not affect the jury's ability to decide the case fairly. Accordingly, trial counsel's failure to object to the prosecutor's statements during closing argument did not fall below an objective standard of reasonableness, nor did any failure to object to those statements affect the result of the proceeding.

The Washington state court decision rejecting petitioner's claim that his trial counsel was deficient in failing to object to statements made by the prosecutor in closing argument was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor was the decision based on an

unreasonable determination of the facts in light of the evidence presented to the state courts. This claim does not warrant habeas relief.

C. Trial counsel's ineffectiveness in agreeing to allow petitioner to be shackled in front of the jury

Petitioner claims that his trial counsel was ineffective when she permitted him to be shackled during trial.

As part of the state court personal restraint proceedings, an affidavit of prosecutor Jerry Ackerman was submitted. Dkt. 44, Exh. 38. In regard to security measures imposed during this trial, Mr. Ackerman stated as follows:

> Prior to trial, there were discussions regarding necessary security measures. There was at least one chambers conference with Judge Worswick, representatives for the defense (who I recall as being ms. Mandel and/or Jack Hill, Director of DAC), deputy prosecutor Ellsworth Connelly, and myself, as well as police officers from the Tacoma Police Department and the Pierce County Sheriff's Office. These discussions were occasioned by law enforcement, and resulted from intelligence obtained from informants "on the street." By way of background, I recall that at that time downtown Tacoma was experiencing problems with drugs, prostitution, extortion, protection rackets, and criminal gangs. Informants familiar with these activities had notified police that there would be an effort by Teddy Powell (the defendant's brother and the alleged leader of the "Bullet" gang) to break out Jerome Powell during the course of the trial because "Jerome Powell was not going back to prison." In addition, there had apparently been a theft of

> plastic explosives from Fort Lewis and police had been informed that these plastic explosives would be used as part of the scheme to free Jerome Powell. Law enforcement believed there was cause for serious concern. At the meeting, various security measures were discussed. For example, police strongly urged the judge, attorneys, and other courtroom personnel to wear bullet proof vests during the trial. In addition, in order to ensure the defendant's right to a fair trial, Judge Worswick also laid some ground rules for permissible security measures. As I recall, Judge Worswick particularly wanted to minimize the opportunity for the jury to see the defendant in restraints. As I further recall, the defense responded to the security concerns by discounting the seriousness of the threats. To the best of my recollection, the defense did not interpose any formal legal objection to the security measures. I further recall that the placement of tables and parties at trial, and the timing and means of the jury's entering and exiting of the courtoom [sic], were designed to minimize any opportunity for the jury to see the defendant in restraints.

Dkt. 44, Exh. 38 at 2-3.

During jury orientation, the trial judge informed the voir dire panel as follows:

> The defendant is in custody and many of the witnesses who the state intends to call are also in custody; some of them from state institutions. Because of this and not because of any particular feature of it, but because in my judgment it is and should be a routine matter, we have determined to have certain routine security precautions taken in this case. They should not concern you at all. They are simply for the purpose of seeing that we have an orderly trial with

> no disturbances or no problems. We are not concerned with the defendant. The concern, if there is any concern, is that when people come down from the institution, sometimes they may have some friends out there who may be interested in the matter and who may want to show up for one reason or another, so we are making sure that we don't have any difficulties about that.

Dkt. 3, File 2, Vol. I at 3.

> Ladies and Gentlemen, one other matter that I want to mention to you in connection with security and I neglected to do so. I told you that the defendant is in custody and several of the witnesses are in custody. Now, you should understand that when a person is in custody, there are routine procedures that apply regardless of what the situation is and one of those routine procedures is that when they are not in court and they are not in the jail, they have to be handcuffed. If you encounter anybody, we try to avoid this, but if you should see either Mr. Powell or any witnesses or anybody like that in handcuffs, it's a routine security precaution required of everyone in custody and has nothing to do whatever with anything else. Please understand that.

Id. at 14.

During voir dire, petitioner's trial counsel brought a motion to impanel a new jury, based in part, on statements made by the court regarding security issues. Petitioner's counsel agreed that some mention of security needed to be made but she objected to the "manner in which we have presented the security issue in combination with the custody of persons that will be appearing in court and this environment of street crime and a gang to the jury. I feel

that the net effect is to intimidate the jurors and to prejudice them unduly with respect to Mr. Powell." Dkt. 3, File 2, Vol. A at 33. The colloquy between the court and counsel continued as follows:

THE COURT: Well, I think I should get a little more detail from you, Counsel. I will have a few remarks to make on the subject in a moment. Are you objecting to the particular security arrangements?

MS. MANDEL: No, I am not. I don't feel that it would be my position to object to security arrangements. I am certainly no expert in security.

THE COURT: Is it fair to say that, in fact, the reason we have security is that the court invited counsel to indicate – counsel to indicate whether they felt it was appropriate and that you did feel it was appropriate, as well as Mr. Ackerman? While you are thinking about it, is it also fair to say that you are the source of some of the information upon which the security decisions have been made?

MS. MANDEL: Your Honor, I can't comment on that in open court. I have no objections to the fact – I understand the reasons for the security. What I am objecting to is the manner in which we have presented the security issue in combination with the custody of persons that will be appearing in court and this environment of street crime and a gang to the jury. I feel that the net

> effect is to intimidate the jurors and to prejudice them unduly with respect to Mr. Powell.

Id.

Petitioner claims that his counsel was ineffective in agreeing to the shackling because a criminal defendant has a constitutional right to appear before a jury free of shackles; there is no strategic reason to allow a person on trial for murder to appear before the jury in chains; and the prohibition against shackling is premised on the fact that it deprives the defendant of the presumption of innocence. Dkt. 52, at 3-6.

In reviewing this claim, the Washington Court of Appeals concluded as follows:

> A criminal defendant has a constitutional right to appear before a jury free of shackles, unless some impelling necessity demands restraint. *State v. Breedlove*, 79 Wash.App. 101, 114, 900 P.2d 586 (1995). Here before trial, he [sic] court judge conferred in camera with defense counsel, the prosecutor, and Tacoma Police officers to discuss security measures for the trial. During these discussions, the court was informed of an alleged plan by Powell's brother, Teddy Powell, to "break out Jerome Powell during the course of the trial because 'Jerome Powell was not going back to prison.'" In addition, as deputy prosecutor Ackerman states in his declaration, the police strongly urged the judge, attorneys, and other courtroom personnel to wear bullet proof vests during the trial because "there was cause for serious concern." Defense counsel did not object to shackling Powell for the trial. Under the circumstances presented to the court, counsel's consent to shackling Powell before the

jury was not objectively unreasonable and his argument fails.

Dkt. 21, Exh. 3 at 8.

The first issue to be addressed here is whether petitioner is entitled to an evidentiary hearing on this claim.

A criminal defendant has a constitutional right to be free of shackles and handcuffs in the presence of the jury absent an essential state interest that justifies the physical restraints. *Ghent v. Woodford*, 279 F.3d 1121, 1132 (9th Cir. 2002). A claim of unconstitutional shackling is susceptible to harmless error analysis. *Duckett v. Godinez,* 67 F.3d 734, 749 (9th Cir. 1995); *Castillo v. Stainer,* 983 F.2d 145, 148 (9th Cir. 1992), *amended by* 997 F.2d 669 (9th Cir. 1993). An unjustified decision to restraint [sic] a defendant at trial requires reversal only if the shackles or handcuffs had substantial and injurious effect or influence in determining the jury's verdict. *Castillo,* 997 F.2d at 669 (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993)).

It is not clear from the record when or how often petitioner was present in the courtroom with restraints, and which, if any, of the jurors saw him in restraints. Nonetheless, the claim in this case is not that the restraints themselves violated petitioner's constitutional rights, but that his counsel was ineffective in failing to object to or prevent his being in restraints in the courtroom. The discussion related to security and restraints was held in chambers and was not recorded. However, the statement of the prosecutor submitted during the state personal restraint proceedings and the trial record provide sufficient information to review the ineffective assistance of counsel claim. The court notes that petitioner takes the position that shackling was not warranted and that

petitioner's counsel should have attempted to prevent it, but he has not provided sufficient factual basis to show that or how the restraints violated his constitutional rights, that is, how the restraints had substantial and injurious effect or influence in determining the jury's verdict. If this court were to grant an evidentiary hearing each time a habeas petitioner was placed in restraints during trial, and each time defense counsel failed to object to the restraints, the court would be put in the position of re-trying that portion of the state case, this time, in hindsight. That is not the purpose of an evidentiary hearing. An evidentiary hearing is granted when a petitioner presents sufficient factual allegations that, if proved, would entitle him to relief. *Insyxiengmay v. Morgan,* 2005 WL 712483, *11 (9th Cir. Wash. 2005). In this case, petitioner has not alleged specific facts that would entitle him to relief; at best, petitioner seeks an evidentiary hearing to develop facts as to the effect the restraints had on petitioner's ability to communicate with his lawyer, to assist in his own defense, or to testify on his own behalf. *Insyxiengmay v. Morgan*, 2005 WL 712483, at *12-13. This effort is no more than fishing for evidence to support a claim. An evidentiary hearing is not warranted on this claim.

Regarding the merits of the claim, the record shows that (1) informants had informed the police that petitioner's brother would try to break him free from custody and that stolen plastic explosives would be used as part of the scheme to free Jerome Powell; (2) the court designed the room and timing to minimize any opportunity for the jury to see the defendant in restraints; and (3) the court attempted to decrease or eliminate effect on the jury by its instructions. Petitioner's counsel was present in chambers

when the security issue was discussed and she discussed the manner in which the security issue was presented to the jury. The record does not support petitioner's claim that his counsel provided ineffective assistance in permitting him to be in restraints during trial. Further, petitioner has not shown that, but for counsel's failure to object to the restraints, there is a reasonable probability that the result would have been different.

The Washington state court decision rejecting petitioner's claim that his trial counsel was deficient in permitting petitioner to be shackled during trial was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor did was the decision based on an unreasonable determination of the facts in light of the evidence presented to the state courts. This claim does not warrant habeas relief.

D. Trial counsel's ineffectiveness in failing to investigate petitioner's alibi witnesses by not interviewing Judy Hampton McDonald and Jessie J. Beard and not investigating the route to the scene of the crime

In his brief in support of his petition, petitioner alleged that his counsel was ineffective, as follows:

> She did not interview Judy Hampton McDonald, though Ms. McDonald's name was evident in the discovery provided by the State. Jessie Beard states she did not interview him. Both would have been defense witnesses to support Mr. Powell's alibi that he could not have been in the Green River area where the murder occurred and in Tacoma at the same time and, therefore, he did not kill the victim. But, trial

> counsel could not have known this, because along with not interviewing witnesses she never traced the route State's witnesses Clark and Razor said was allegedly taken from Tacoma to the murder scene in the Green River area.

Dkt. 2 at 24-25.

In support of his state court personal restraint petition, petitioner filed an affidavit of Ms. McDonald, which was signed on April 3, 1995. Dkt. 3, Exh. 12. Ms. McDonald stated that, on April 4, 1979 [the morning of Mr. Allison's murder], she left the Ebb Tide at 6 am, with Carol Ngirmeker, Eva Wolf, petitioner, her friend Ava, and Jessie Beard; that she went to her friends' apartment and stayed there for approximately 20 minutes; that Jessie Beard and Donald Clark took Ava and her to Ms. McDonald's home at 7 am; that she made a statement to the police on August 27, 1979, as a result of police threats and was therefore not voluntary; and that the August 27, 1979, statement was not correct. *Id.* In her statement to police on August 27, 1979, Ms. McDonald stated that she had been at the Ebb Tide until 6 am, and then she and James Beard got a ride back to her house with petitioner, in his yellow and black car; and that they arrived at her house at 7 am, when "Alvin and the Chipmunks were coming on TV." *Id.* Petitioner claims that his counsel did not contact Ms. McDonald prior to trial, and that if she had contacted her, Ms. McDonald's testimony would have been important to establish an alibi defense for petitioner: that he would not have had time to drive to the murder scene, murder Mr. Allison, and then return to Tacoma by the time other witnesses placed him back in Tacoma. Petitioner claims that his counsel never investigated the route to the murder scene in order to help establish the alibi defense.

On November 6, 1994, petitioner's counsel for his state court collateral attack and an investigator interviewed Jessie Beard at a correctional facility in Tennessee. Dkt. 3, Exh. 25. This "Declaration upon Oral Examination of Jessie James Beard" was submitted in support of petitioner's personal restraint petition. Mr. Beard stated that, on the morning of Mr. Allison's murder, he left the club [Ebb Tide] before the club closed; that the club closed at 7 am; that he left with petitioner, Buffy, Carol, and Judy McDonald sometime around "4:30, maybe 5 o'clock, maybe later. I'm not sure."; that he dropped Judy McDonald off at her home; that he and petitioner returned to the apartment on 27th and saw that Donald Clark, Robert Razor and Mr. Allison were involved in a confrontation in the parking lot; that petitioner went over to talk to his brother Teddy, who was also present in the parking lot; that petitioner asked Mr. Allison if he was all right and if he wanted to go to the doctor; that Mr. Allison said that he was fine, and he went home; that Mr. Beard went into the house, with petitioner and others, and helped straighten it up about 7:30 or 8 am; that it was maybe an hour or an hour and a half from the time he got to the house until he left. When asked what he would have told petitioner's attorney if she had contacted him in 1982, he stated "I would have told him that he didn't have anything to do with it, which he didn't." Dkt. 3, Exh. 25 at 45.

In reviewing this claim, the Washington Court of Appeals concluded as follows:

> Powell next asserts his trial counsel acted deficiently in failing to investigate the route Powell allegedly took to the murder scene. Powell maintains that trial counsel would have discovered information leading to impeachment of one of the State's witnesses. Powell also maintains that he had an alibi.

> The presumption of effective assistance may be overcome if counsel failed to sufficiently investigate the facts in preparing for trial. *State v. Maurice,* 79 Wash. App. 544, 552, 903 P.2d 514 (1995). In the present case, the evidence before the court did not conclusively establish the route to the murder scene or the duration of travel. Witnesses gave varying accounts of the route and the time traveled between Tacoma and the murder scene. Therefore, even if Powell's counsel had investigated Powell's route, such investigation would not have conclusively established the route or time. Even assuming, as Powell submits, that the investigation would have further corroborated his account, this evidence would have been compared with other accounts by other witnesses. It cannot be said that the failure to investigate the route was deficient or that it prejudiced Powell's defense such that the trial's outcome would have been different.

Dkt. 2, Exh. 2 at 9-10.

In determining whether counsel's representation fell below an objective standard of reasonableness, the reviewing court will defer to counsel's strategic decision to present, or to forgo, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland,* 466 U.S. at 689; *Hendricks v. Calderon,* 70 F.3d 1032, 1036 (9th Cir. 1995); *United States v. Layton,* 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied* 489 U.S. 1046 (1989); *Campbell v. Kincheloe,* 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied* 488 U.S. 948 (1988).

The actual route taken to the murder scene, the speed of travel, and the actual duration of travel time were never determined. Moreover, the testimony elicited from the

various witnesses about the timing of the incidents on the morning of the crime varied and/or was vague. *See* Dkt. 3, File 2, Vol. II at 314, 341, 353, 393 & 446; *Id.*, Vol. III at 454, 458, 475, 485 & 493. Ms. McDonald and Mr. Beard's testimony would have been unhelpful, since their estimates of time are as vague as that of the witnesses who testified. Petitioner's trial counsel apparently made a reasonable strategic decision to focus on more promising theories of defense, and to forego developing an alibi theory that, at most, would have lent some corroboration of petitioner's testimony, but more likely would have added little to support the defense. Further, Mr. Beard was a co-defendant in this case; it is questionable whether petitioner's counsel would have been afforded the opportunity to talk with him before trial. Even if she had, Mr. Beard's statement that petitioner had nothing to do with the murder was part and parcel of his self serving statement denying involvement in the incident. Counsel apparently made a reasonable strategic decision to proceed with other witnesses and theories of the case. Accordingly, trial counsel's failure to interview these witnesses and investigate the route to the murder scene did not fall below an objective standard of reasonableness, nor did any failure to on counsel's part affect the result of the proceeding.

The Washington state court decision rejecting petitioner's claim that his trial counsel was deficient in failing to interview witnesses and investigate the route to the murder scene, was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor was the decision based on an unreasonable determination of the facts in light of the evidence presented to the state courts. This claim does not warrant habeas relief.

E. Trial counsel's ineffectiveness in failing to bring pretrial motions in limine to exclude irrelevant prejudicial evidence

Petitioner's claim is as follows:

> Mr. Powell's involvement with a group of people the State characterized as a "gang"; his sexual relations with white women; and/or his alleged prostitution activities were not relevant to the State's prosecution of him for murder in the First Degree of Charles Allison. Yet these irrelevant, highly prejudicial facts were brought out on numerous occasions throughout the trial, because trial counsel did not bring motions in limine.

Dkt. 2, at 24.

In reviewing this claim, the Washington Court of Appeals concluded as follows:

> Powell contends his trial counsel performed deficiently in failing to object to evidence of interracial sexual relations among co-defendants, alleged gang activities, and other criminal activities. Witnesses may be examined regarding motive, bias, or interest. *See State v. Calhoun,* 13 Wn.App. 644, 651, 536 P.2d 668 (1975). Here, Powell, other co-defendants, and several witnesses were part of a gang known as "The Bullets," who banded together as a family to help one another. Therefore, evidence of Powell's gang membership, relations among group members, and their collective activities is probative of the individuals' motive or bias in providing testimony at trial. Moreover, where defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for an ineffective assistance claim. *State v. Garrett,* 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Accordingly, counsel's conduct in failing to seek the

> exclusion of such evidence was not unreasonable or deficient.

Id., Exh. 2 at 7.

In this case, the state court found that this evidence was properly admitted under Washington law; this ruling is binding on the federal court. *See Estelle v. McGuire,* 112 S.Ct. 375 (1991); *Middleton v. Cupp,* 768 F.2d 1083, 1085 (9th Cir. 1985) (Habeas relief is unavailable for error in the interpretation or application of state evidentiary rules). Because the evidence was admissible, the trial judge would have overruled any objection petitioner's trial counsel might have made. Accordingly, trial counsel's failure to object to admission of the evidence was not deficient representation. Further, petitioner has not shown that there is a reasonable probability that, but for counsel's failure to object to admission of the evidence, the result would have been different.

The Washington state court decision rejecting petitioner's claim that his trial counsel was deficient for failing to object to the admission of allegedly prejudicial evidence was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor was the decision based on an unreasonable determination of the facts in light of the evidence presented to the state courts. This claim does not warrant habeas relief.

F. Conclusion

The court has carefully reviewed the record and each claim petitioner has made that his trial counsel was

ineffective. As discussed above, these claims do not warrant habeas relief.

2. Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of counsel on direct appeal. *Evitts v. Lucey,* 469 U.S. 387, 397 (1985). The right to effective assistance of counsel on appeal arises out of the Fourteenth Amendment. *Martinez v. Court of Appeal of Calif.,* 120 S.Ct. 684, 688-92 (2000). Like a claim of ineffective assistance at trial, a claim that counsel was ineffective on appeal is also reviewed under a two-prong standard. *Roe v. Flores-Ortega,* 528 U.S. 470, 477 (2000); *Smith v. Murray*, 477 U.S. 527, 536 (1986); *Smith v. Robbins,* 528 U.S. 259 (2000); *Morrison v. Estelle,* 981 F.2d 425, 427 (9th Cir. 1992), *cert. denied,* 508 U.S. 920 (1993); *Miller v. Keeney,* 882 F.2d 1428, 1433-34 (9th Cir. 1989). The petitioner must first prove that counsel's performance fell below an objective standard of reasonableness. *Flores-Ortega,* 528 U.S. at 477. The court must judge the reasonableness of counsel's conduct on the facts of the case, viewed as of the time of counsel's conduct. *Id.* Judicial scrutiny of counsel's performance must be highly deferential. *Id.* (quoting *Strickland,* 466 U.S. at 689). The petitioner must also show that counsel's deficient performance caused prejudice. *Flores-Ortega,* 528 U.S. at 477.

Petitioner claims that his appellate counsel was constitutionally deficient because he did not order the entire trial transcript, and, as a result, meritorious issues were not raised on appeal. Petitioner contends that appellate counsel ordered only the transcript of the Omnibus Hearing and trial motions, and did not order the trial transcript. As a result, petitioner claims his counsel failed

to raise potentially meritorious claims on appeal. Petitioner contends that, had those meritorious issues been raised, he would have received the benefit of a lower standard of review of the issues.

In reviewing this claim, the Washington Court of Appeals concluded as follows:

> The exercise of independent judgment in deciding which issues form the basis of a successful appeal is at the heart of the attorney's role in our legal process. *In re Personal Restraint of Lord,* 123 Wn.2d 296, 314, 868 P.2d 835 (1994). Consequently, the failure to raise all possible nonfrivolous issues on appeal does not constitute ineffective assistance of counsel. *Lord,* 123 Wn.2d at 314. To prevail on appellate ineffective counsel claim, the petitioner "must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice." *Lord,* 123 Wn.2d at 314.
>
> Citing *Eskridge v. Washington State Bd. Of Prison Terms and Paroles,* 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958) and *Entsminger v. Iowa,* 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967), Powell argues that appellate counsel provided ineffective assistance in failing to request a full transcript. These authorities, however, do not support his claim, nor do we find case law which stands for the same. Powell does not demonstrate prejudice, and his argument fails.

Dkt. 2, Exh. 2 at 10-11.

Petitioner has cited no clearly established law that requires appellate counsel to order and review the entire transcript in each case before filing an appeal. At issue in this case, therefore, is whether the failure of petitioner's appellate counsel in this case fell below an objective

standard of reasonableness and if petitioner was prejudiced by counsel's alleged deficient performance.

In this case, even if his appellate counsel fell below an objective standard of reasonableness in failing to order the entire trial transcript, petitioner has failed to show that he was prejudiced by counsel's deficient performance. The potentially meritorious issues plaintiff alleges are as follows:

A. Prosecutorial Misconduct, Use of Restraints, Ineffective Assistance of Counsel

Petitioner claims that his appellate counsel should have raised the following issues and that he would have had a more favorable standard of review if these issues had been raised on appeal rather than on collateral attack: prosecutorial misconduct in expressing personal opinion as to the credibility of state and defense witnesses; prosecutorial misconduct in questioning petitioner on cross-examination as to his opinion of credibility of certain witnesses; use of restraints; trial counsel's ineffectiveness in permitting petitioner to be shackled at trial; trial counsel's ineffectiveness in failing to object to prosecutor's improper statements as to petitioner's personal opinion of the credibility of the witnesses; trial counsel's ineffectiveness in not investigating alibi defense; and trial counsel's ineffectiveness in not bringing pretrial motions in limine to exclude irrelevant prejudicial evidence. The court has discussed the merits of these issues above. Petitioner has not shown that, if any or all of these issues had been raised on appeal, they would have resulted in reversal of petitioner's conviction under state

law. The cases petitioner cites in support of his claim of prejudice are distinguishable on the facts.

B. Cross-Examination of Co-Defendant

Petitioner also claims that, if appellate counsel had had the trial record, he could have raised the issue that he was denied his constitutional rights when the trial court refused to permit him to cross examine a co-defendant regarding a favorable plea agreement, and that, had he appealed that issue, his conviction would have been reversed.

The issue relates to a plea bargain entered into by petitioner's codefendant, Donald Clark. The direct examination related to this issue is as follows:

Q. Mr. Clark, you pled guilty to a charge in connection with your involvement in this, haven't you?

A. First degree manslaughter.

Q. And in fact you are not currently in the Pierce County Jail, are you?

A. At the time I am on a medical leave.

Dkt. 3, File 2, Vol. II at 357.

On cross examination, petitioner's counsel questioned Mr. Clark as follows:

Q. Didn't you consult with your attorney about whether or not you should talk about Teddy Powell?

A. On certain things. There are certain things that I probably wouldn't answer questions to right now either.

Q. And you also didn't want to talk about any of the details of the plea bargain you made, isn't that true?

A. I didn't make any plea bargain.

Q. You are saying that the prosecuting attorney allowed you to plead guilty to manslaughter and that there was no plea bargain involved?

A. The only bargain that was made was that they offered me that I could stay in the Pierce County Jail under protective custody on account of threats on my life.

Q. And you got to stay. You didn't have to go to prison.

A. Well, I'd say that from what I have talked.

Q. The question is, you didn't have to go to prison, isn't that true?

A. What do you call the Pierce County Jail for 30 months?

Q. Do you know the difference between a jail and a prison?

A. Well, there are times when people would rather stay in prison than the Pierce County Jail.

Q. Mr. Clark, you didn't have to go to prison. That is the question.

A. No. I stayed in Pierce County Jail. I am still in jail.

Q. And you pled guilty to a crime which is a maximum penalty of ten years.

MR. ACKERMAN: Objection, ;Your Honor.

THE COURT: Objection sustained.

MS. MANDEL: Your Honor, I'd like to be heard on that.

THE COURT: It's argumentative, proceed.

Dkt. 3, File 2, Vol. II at 372-73.

In her closing argument, defense counsel argued as follows:

> Why would you believe Donald Clark? Donald Clark wouldn't even let us see his eyes. Donald Clark had a lot to gain through this story. Donald Clark got a plea bargain. Donald Clark is in the Pierce County Jail. Donald Clark pled guilty to manslaughter.

Dkt. 3, File 2, Vol. III at 529.

In reviewing this claim, the Washington Court of Appeals concluded as follows:

> Where a witness who entered into a plea bargain agreement testifies against the defendant, the defendant is entitled to cross-examine the witness regarding the extent of the plea bargain and the witness's motives for the plea. *State v. Portnoy,* 43 Wn.App. 455, 718 P.2d 805, *review denied,* 106 Wn.2d 1013 (1986); *see also State v. Ahlfinger,* 50 Wn.App. 466, 475 n.4, 749 P.2d 190, *review denied,* 100 Wn.2d 1035 (1988)(State's interest in keeping information about plea bargain from jury is outweighed by defendant's right to confront witness and alert jury to potential bias).
>
> Here, although Powell correctly asserts he was denied the right to cross-examine Clark regarding his

> plea bargain with the State, the denial of cross-examination did not prejudice him because, as the State notes, the jury had already been told about Clark's plea to a lesser charge and sentence.

Dkt. 2, Exh. 2 at 14-15.

Petitioner claims that he was prejudiced because, had appellate counsel raised this issue on appeal, his conviction would have been reversed, citing *State v. Brooks,* 256 Wn.App. 550 (1980). In *Brooks,* the Washington Court of Appeals reversed a conviction because the defendant, while permitted to cross examination of a codefendant on a plea bargain, was not permitted to cross examine the codefendant about the dropping of the deadly weapon allegation pursuant to the plea bargain agreement that had obviated a mandatory 5-year minimum term for the codefendant if he were sentenced to prison. In this case, all significant facets of Mr. Clark's plea bargain were before the jury. The testimony showed that Mr. Clark pled guilty to manslaughter, and he received a 30 month sentence in the county jail. While the prosecutor's objection to defense counsel's question regarding the maximum length for a manslaughter conviction was sustained, the maximum length of a manslaughter term had little or no import in this case – Mr. Clark received a 30-month term in the county jail for that conviction. While the court may have erred in sustaining the objection to the maximum term of a manslaughter conviction, petitioner was not prejudiced by the court's ruling.

Petitioner has not shown that, had his appellate counsel raised the issue of cross-examination related to Mr. Clark's plea agreement on appeal, he would have received the benefit of a more favorable standard of review than he did when the issue was raised on collateral attack.

C. Conclusion

The court has carefully reviewed the record and each claim petitioner has made that his appellate counsel was ineffective. As discussed above, these claims do not warrant habeas relief.

3. Confrontation Claim

In his objections to the Report and Recommendation, petitioner claims that he was denied his constitutional right to confront and cross-examine Mr. Clark regarding the terms of his plea agreement. As discussed above, the cross examination issue was raised in the context of petitioner's claim of ineffective assistance of his appellate counsel. The court has carefully reviewed the record. Petitioner did not raise this claim, apart from his claim of ineffective assistance of appellate counsel. *See* Dkt. 21, Exh. 19, at i-ii x-xi & 26-28. *See also id.,* Exh. 18 & Dkt. 2, Exh. 8. The claim is therefore unexhausted and procedurally barred in this proceeding. *O'Sullivan v. Boerckel,* 119 S.Ct. 1728, 1733-34 (1999); *Coleman v. Thompson,* 501 U.S. 722, 750-751 (1991); *Noltie v. Peterson,* 9 F.3d 802, 805 (9th Cir. 1993).

3 [sic]. Limitation of evidence in reference hearing regarding victim's cause of death

Petitioner contends that he was limited in the state court reference hearing as to the cause of the victim's death.

Petitioner first maintains that, if he had been permitted to present testimony of Judy Hampton McDonald and Denise Scaffidi, he would have been able to develop the

facts necessary to establish his ineffective assistance of trial counsel claim related to his alibi defense. Ms. McDonald's testimony has been described above. Denise Scaffidi was a private investigator who traced the route described by Donald Clark at the 1982 trial. At the reference hearing, petitioner offered her testimony in support of the claim that petitioner couldn't possibly have been at the murder scene at the time the murder is alleged to have occurred. See Dkt. 3, File 1, at 231-237. The issue of the time and distance between Tacoma and the place of the murder has been discussed above; petitioner has not shown that his trial counsel was ineffective as to this issue.

Second, the decision of the judge at the reference hearing to exclude James Beard's statement as described above was not objectionable, since Mr. Beard was unavailable and the evidence petitioner offered was not admissible under the rules of evidence. *See* Dkt. 3, File 1, Vol. 5 at 468-77.

This claim does not warrant habeas relief.

4. Evidentiary Hearing

Petitioner requests an evidentiary hearing to develop petitioner's the facts regarding (1) the effect the restraints had on petitioner's ability to communicate with his lawyer, to assist in his own defense, or to testify on his own behalf; (2) whether his trial counsel objected to the use of restraints at trial, and whether trial counsel's failure to object to the prosecutor's allegedly improper questioning and her failure to object to the prosecutor's allegedly improper closing arguments was a fully informed strategic choice; and (3) whether appellate counsel winnowed the

good issues from the bad or failed to review them at all. Dkt. 52, at 12-13. The court has discussed the issues related to the restraints above and has concluded that the record is sufficiently developed to review the claims related to shackling. Further, the record is sufficient to review the ineffective assistance of trial and appellate counsel. An evidentiary hearing is not warranted.

Therefore, it is hereby

ORDERED that the recommendation of the magistrate judge in the Report and Recommendation of the Magistrate Judge (Dkt. 54) is **ADOPTED**, based upon the reasoning herein. The petition for writ of habeas corpus is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**. The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 27th day of April, 2005.

/s/ Robert J. Bryan
Robert J. Bryan
U.S. District Judge

United States District Court
WESTERN DISTRICT OF WASHINGTON

JEROME POWELL — JUDGMENT IN A CIVIL CASE

v.

JOSEPH LEHMAN — CASE NUMBER: C00-5672RJB

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

The recommendation of the magistrate judge in the Report and Recommendation (Dkt 54) is ADOPTED. The petition for writ of habeas corpus is DENIED, and this case is DISMISSED WITH PREJUDICE.

April 28, 2005

BRUCE RIFKIN
Clerk

/s/ Dara L. Kaleel
By Dara L. Kaleel, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME POWELL, Petitioner, v. JOSEPH LEHMAN, Respondent.	Case No. C00-5672RJB REPORT AND RECOMMENDATION (Filed March 21, 2005) **NOTED FOR: APRIL 22nd, 2005**

This habeas corpus action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636 (b)(1)(B) and Local Magistrates' Rules MJR 3 and MJR 4. Petitioner in this action is seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254. (Dkt. #1)

INTRODUCTION AND SUMMARY OF CONCLUSIONS

Petitioner was a state prisoner sentenced in 1982 to life with the possibility of parole. He was paroled in 1997 and granted a final discharge on December 15, 2000. He filed this petition in November 2000 and was "in custody" for the purposes of 28 U.S.C. 2254. In his Petition for a Writ of Habeas Corpus, he challenges his 1982 conviction and sentence on the following grounds:

1. Ineffective assistance of appellate counsel.
2. Ineffective assistance of trial counsel.

3. Petitioner was limited in the evidence he could present in the State Superior Court reference hearing regarding the cause of the victim's death.

(Dkt. # 2.)

Review of the claims shows them to be without merit. This petition should be dismissed with prejudice.

PROCEDURAL HISTORY

Petitioner plead guilty to first degree murder and first degree kidnaping on October 2, 1979. A motion to withdraw the guilty plea was denied, but that decision was reversed on appeal. On remand, Petitioner plead not guilty, but, was found guilty of first degree murder after a jury trial. The Petitioner appealed, and the conviction and sentence were affirmed on May 31, 1983. *State v Powell,* 34 Wn. App. 781, 664 P.2d 1 (1983). The State Supreme Court denied review on January 6, 1984. *State v Powell,* 100 Wn. 2d 1035 (1984).

In Petitioner's motion for review to the State supreme court, he argued that:

1. His right to speedy trial was violated under CrR 3.3;

2. His right to joinder of a related issue was violated under CrR 4.3(c)(3); and

2. [sic] His right against double jeopardy was violated by the filing of an amended information.

(Dkt. # 21, Exhibit 5, pages 1 and 2.)

On October 24, 1990 Petitioner filed his first state collateral attack with the Court of Appeals for the State of

Washington. (Dkt. # 21, Exhibit 6.) In his personal restraint petition he challenged decisions of the Indeterminate Sentence Review Board (ISRB) and not his underlying conviction. (Dkt. # 21, Exhibit 6.) The petition was consolidated with a second petition that also challenged ISRB actions. (Dkt. # 21, Exhibit 8.) On December 4th, 1991 the court of appeals denied the consolidated petitions. (Dkt. # 21, Exhibit 10.)

Petitioner then filed a motion for review with the state supreme court, raising the following issues:

> 1. Whether or not the Court of Appeals has committed obvious and probable error by condoning the Board's use of the unconvicted and uncharged crime of kidnaping as a basis for Petitioner Powell's exceptional minimum term, thereby substantially limiting his freedom?
>
> 2. Whether or not the Court of Appeal [sic] has committed obvious and probable error by condoning the misinterpretation and misapplication of RCW 9.95.010, 9.95.116, and 9.95.170 by the Board when setting the exceptional minimum term of Petitioner Powell, thereby sanctioning the Board's departure from its statutory authority and the accepted and usual course of proceedings, as provided by statute?

(Dkt. # 21, Exhibit 13.)

The state supreme court denied review (Dkt. #21, Exhibit 14) and a subsequent motion to modify. (Dkt # 21, Exhibit 17.)

Petitioner filed a third personal restraint petition with the state court of appeals on September 6, 1996. (Dkt. # 21, Exhibit 18.) He raised the following issues:

> 1. A violation of his right to effective assistance of trial and appellate counsel, as guaranteed by the V, VI, and XIV Amendments of the U.S. Constitution and Article 1, §§ 3 and 22 of the Washington State Constitution;
>
> 2. A violation of his right to a fair trial, as guaranteed by the V, VI, and XIV Amendments of the U.S. Constitution and Article 1 §§ 3 and 22 of the Washington State Constitution; and
>
> 3. Undue delay in his consideration for parole by the ISRB because he is not being credited with his pre-conviction jail time, as required by *State v. Phelan*, 100 Wn.2d 508, 671 P.2d 212 (1983) and guaranteed to him by the U.S. Constitution, Amend. V. and Article 1, § 3 of the Washington State Constitution.

(Dkt. # 21, Exhibit 18, pages 25 and 26.)

The court of appeals directed the superior court to hold a reference hearing. The superior court concluded that petitioner received a fair trial. (Dkt. # 21, Exhibit 25.) Based on the Superior Court's Findings of Fact Re: Reference Hearing, the court of appeals dismissed the petition on January 10, 2000. (Dkt. # 21, Exhibit 26.)

Petitioner filed a motion for discretionary review with the state supreme court on January 28, 2000. (Dkt. # 21, Exhibit 28.) The motion for review was denied March 17, 2000. The Commissioner of the Washington Supreme Court found the petition to be untimely and therefore procedurally barred under R.C.W. 10.73.090 and 10.73.130. (Dkt. # 21, Exhibit 30.) The commissioner also found that the court of appeals erred in considering the petition as it was procedurally barred. Petitioner filed a motion to modify the commissioner's ruling on April 11, 2000, which was denied on June 6, 2000. (Dkt. #32, Exh.

11.) Petitioner filed his habeas corpus petition November 14, 2000.

The petition was dismissed by this court as being procedurally barred. (Dkt. # 29). That decision was appealed and the Ninth Circuit has remanded with the instruction that "to the extent that Powell's federal claims were contained in his state personal restraint petition filed in 1996, Powell has exhausted his state remedies." *Powell v. Lehman,* 357 F. 3rd 871, 880 (9th Cir. 2004). The petition will therefore be considered on the merits to the extent indicated by the Ninth Circuit. In his Petition for a Writ of Habeas Corpus, he challenges his 1982 conviction and sentence on the following grounds:

1. Ineffective assistance of appellate counsel.
2. Ineffective assistance of trial counsel.
3. Petitioner was limited in the evidence he could present in the State Superior Court reference hearing regarding the cause of the victim's death.

FACTUAL HISTORY

The state court of appeals summarized the facts surrounding Powell's conviction as follows:

> In early August 1979, a group alternatively called "The Bullets" and "The Family" took Charles Allison, the victim, to a secluded area near Kent, where he was murdered. Jerome Powell was a member of this group. According to the other group members, all of whom pled guilty to lesser offenses, Powell went into some bushes where the victim lay bound and returned a short time later with a blood covered knife.

On August 10, 1979, the State charged Powell with first degree felony murder and first degree kidnapping (sic). On October 2, 1979, the first day of trial, he pled guilty to first degree murder. But before sentencing, he moved to withdraw his plea, but the trial court denied the motion. Powell appealed. This court set aside Powell's guilty plea because the record did not contain sufficient factual basis to sustain the plea and remanded the case to the trial court for entry of a plea. *See State v. Powell*, 29 Wn. App. 163, 627 P.2d 1337 (1981).

Upon remand, the State charged Powell by an amended information with first degree murder. Powell pled not guilty. At trial, the State argued that Powell committed the murder by slitting the victim's throat and in support presented considerable circumstantial evidence. This evidence included extensive testimony from other members of Powell's group and physical evidence of the alleged crime, including photographs of the victim's body and a knife with its sheath, which the State asserts was the murder weapon.

In response, Powell contended the victim's death was not caused by slitting of his throat, but rather by a blow to the victim's head delivered by one of the other group members with a revolver. But while Powell's initial appeal was pending, a prosecutor, Tom Dinwiddie, who was not assigned to the case, mistakenly authorized destruction of some physical evidence from Powell's case, including the revolver allegedly used to strike the victim's head and the knife and sheath. Dinwiddie authorized the destruction in April 1981, before this court remanded Powell's case. As Dinwiddie testified at the 1982 trial, he

> gave the authorization believing the evidence belonged to one of his own cases.
>
> The jury found Powell guilty of first degree murder. The trial court sentenced Powell to a maximum life sentence with a mandatory minimum sentence of 20 years. Powell appealed his conviction. This court affirmed his conviction, *State v. Powell,* 34 Wn. App. 791, 664 P.2d (1983), *review denied,* 100 Wn.2d 1035 (1984), and also denied Powell's motion for reconsideration.

(Dkt. # 21, Exhibit 5).

STANDARD OF REVIEW

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). Further, a determination of a factual issue by a state court shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

DISCUSSION

A. Ineffective Assistance of Appellate Counsel

A claim of ineffective assistance of counsel at the appellate stage is based on a violation of a petitioner's Fourteenth Amendment rights as opposed to a claim of

ineffective assistance of trial counsel which is based on a Sixth and Fourteenth Amendment rights. *Martinez v. Court of Appeals of California,* 528 U.S. 152 (2000). The constitutional rules regarding what constitutes effective assistance of trial counsel do not automatically extend to appellate counsel. The test for determining if counsel was effective however is still a two prong test. The petitioner must show that counsel's performance fell below an objective standard of reasonableness and that the petitioner was prejudiced. *Roe v Flores-Ortega,* 528 U.S. 470 (2000).

Petitioner argues that appellate counsel was ineffective because counsel did not order the entire transcript before filing an appeal. (Dkt. # 2, pages 9 to 13). It is uncontested that a person appealing a criminal conviction is entitled to a copy of the transcript. Further, a person filing a direct appeal from a criminal conviction is entitled to counsel who acts as an advocate for them. *Davis v. Kramer,* 167 F.2d 494 (9th Cir. 1997); citing *Anders v. State of California,* 386 U.S. 738 (1967). Petitioner argues it is therefore mandatory for counsel to have ordered and reviewed the entire transcript before filing an appeal. (Dkt. # 2, pages 9 to 11).

While there is a logical progression to petitioner's argument, the court is not willing to state that in all cases it is mandatory to order the entire transcript of a criminal case to provide effective assistance of counsel. Nor could this court say it was clearly established law that the complete transcript had to be ordered in every case.

Even were the court to assume that by not ordering the entire transcript counsel's performance was objectively below the required level, the claim fails, as petitioner does

not show that he was prejudiced. The state court of appeals considered this issue and stated:

> The exercise of independent judgment in deciding which issues form the basis of a successful appeal is at the heart of the attorney's role in our legal process. *In re Personal Restraint of Lord,* 123 Wash.2d 296, 314, 868 P.2d 835 (1994). Consequently, the failure to raise all possible nonfrivolous issues on appeal does not constitute ineffective assistance of counsel. *Lord,* 123 Wash.2d at 314, 868 P.2d 835. To prevail on an appellate ineffective counsel claim, the petitioner "must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice." *Lord,* 123 Wash.2d at 314, 868 P.2d 835. Citing *Eskridge v. Washington State Bd. of Prison Terms and Paroles,* 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958) and *Entsminger v. Iowa,* 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967), Powell argues that appellate counsel provided ineffective assistance in failing to request a full transcript. These authorities, however, do not support his claim, nor do we find case law which stands for the same. Powell does not demonstrate prejudice, and his argument fails.

This court agrees with the state court of appeals analysis and petitioner has failed to show that the state courts decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state

courts. This issue is without merit and should be **DISMISSED**.

B. Ineffective Assistance of Trial Counsel.

The test set forth in *Strickland v. Washington,* 466 U.S. 688 (1984) controls the analysis. The test has two prongs. First petitioner must show that counsel's performance fell below an objective standard of reasonableness. Id. at 686. Second, the petitioner must show that there is a reasonable probability that, but for the error, the outcome or verdict would have been different. Id. at 694.

Petitioner argues trial counsel was ineffective in five areas:

1. Allowing improper cross examination of Mr. Powell.
2. Failing to object to improper closing argument.
3. Agreeing to allow petitioner to be shackled at trial.
4. Failing to bring pretrial motions to exclude evidence.
5. Failing to investigate the route taken to the murder scene.

(Dkt. # 2).

1. Cross examination of Powell.

This issue was first raised in the Court of Appeals by a motion and supplemental brief filed on behalf of the petitioner on August 10, 1999. (Dkt. #2, Exhibit 6.) In his Motion for Discretionary Review filed in the Supreme

Court of the State of Washington, the petitioner admitted that on August 10, 1999 the Court of Appeals denied the petitioners motion to add an additional issue to his personal restraint petition. (Dkt. #2, Exhibit 8, page 5.) Pursuant to the directive of the Ninth Circuit Court of Appeals, this issue was not contained in the 1996 state personal restraint petition and therefore it is not before this court. Additionally, it is the Court's view that this issue is also procedurally barred due to the order of the State Court of Appeals.

2. Closing argument.

In deciding this issue the state court of appeals held:

> 4. Closing Argument
>
> Powell next contends that his trial counsel was deficient in failing to object to prosecutorial comments regarding witness credibility and to misstatements of facts during closing argument. Powell's contention is without merit.
>
> A prosecutor may not offer a personal opinion regarding a witness' veracity, but may comment on witness credibility. *State v. Neidigh*, 78 Wn. App. 71, 74, 895 P.2d 423 (1995). Our review of the State's closing argument discloses that counsel gave his opinion regarding testimony from several witnesses by stating that a particular witness "is entirely credible" or "is the only credible witness," while other times stating that testimony is "entirely fanciful" or "completely transparent." These remarks were more than just comments on witness veracity. They were estimations and conclusions about the ultimate worthiness of the testimony. Thus, in failing to object to the prosecutor's opinions, defense counsel

> performed deficiently. Nonetheless, Powell does not demonstrate that this error was prejudicial, that is, but for this deficiency, the jury would have returned a different verdict, particularly in light of substantial testimony from other witnesses and other circumstantial evidence inculpating Powell. Powell's contention fails.

(Dkt. # 2, Exhibit 3, pages 8 and 9).

There is nothing before this court that would lead to the conclusion that the outcome in this case would have been any different had this misconduct not occurred. The evidence against Mr. Powell includes statements by multiple witnesses. The evidence included Eva Wolfe's testimony that Mr. Powell told her she needed to clean her car. Ms. Wolfe testified there was blood in the car. (Trail [sic] Transcript, Volume II, page 315). This testimony contradicted Mr. Powell's testimony that he helped the victim get into his own car and drive away.

There was also testimony from two people who allegedly accompanied Mr. Powell to the murder scene and then remained with the cars while Mr. Powell took the victim into the woods. These persons testified that Mr. Powell returned to the cars to obtain a knife, went back into the woods and later returned with a bloody knife. One of the people testified Mr. Powell stated he had stabbed the victim three times in the throat while the other victim testified that Mr. Powell said he had slit the victim's throat. (Testimony of Robert Razor and Donald Clark, Trial Transcript, Volume II).

The petitioner has failed to show he is entitled to any relief on this claim and the claim should be **DISMISSED**.

3. Restraint of the Petitioner at Trial.

The trial transcript is now before the court and close scrutiny not only of the trial transcript but also of the pleadings filed on behalf of the petitioner lead to the conclusion that this issue is without merit. The transcript does show that the court had in camera conversations with counsel and security personnel regarding security for the trial. Additionally, during jury orientation the judge made the following statements to the voir dire panel:

> The defendant is in custody and many of the witnesses who the state intends to call are also in custody; some of them from state institutions. Because of this and not because of any particular feature of it, but because in my judgment it is and should be a routine matter, we have determined to have certain routine security precautions taken in this case. They should not concern you at all. They are simply for the purpose of seeing that we have an orderly trial with no disturbances or no problems. We are not concerned with the defendant. The concern, if there is any concern, is that when people come down from the institution, sometimes they may have some friends out there who may be interested in the matter and who may want to show up for one reason or another, so we are making sure that we don't have any difficulties about that.

(Verbatim Report of Proceedings, Volume I, page3.)

> Ladies and Gentlemen, one other matter that I want to mention to you in connection with security and I neglected to do so. I told you that the defendant is in custody and several of the witnesses are in custody. Now, you should understand that when a person is in custody, there are

> routine procedures that apply regardless of what the situation is and one of those routine procedures is that when they are not in court and they are not in the jail, they have to be handcuffed. If you encounter anybody, we try to avoid this, but if you should see either Mr. Powell or any witnesses or anybody like that in handcuffs, it's a routine security precaution required of everyone in custody and has nothing to do whatever with anything else. Please understand that.

(Verbatim Report of Proceedings, Volume I, page 14.)

Other than this reference in the record, nothing has been called to the court's attention regarding the use of any type of restraint on the petitioner while he was present in the courtroom.

During voir dire defense counsel brought a motion to impanel a new jury, based in part, on statements made by the court regarding security issues. Defense counsel agreed that some mention of security needed to be made but she objected to the "manner in which we have presented the security issue in combination with the custody of persons that will be appearing in court and this environment of street crime and a gang to the jury. I feel that the net effect is to intimidate the jurors and to prejudice them unduly with respect to Mr. Powell." (Verbatim Report of Proceedings, Vol. A, page 33.) The remaining colloquy between the court and counsel is as follows:

> THE COURT: Well, I think I should get a little more detail from you, Counsel. I will have a few remarks to make on the subject in a moment. Are you objecting to the particular security arrangements?

MS. MANDELL [sic]: No, I am not. I don't feel that it would be my position to object to security arrangements. I am certainly no expert in security.

THE COURT: Is it fair to say that, in fact, the reason we have security is that the court invited counsel to indicate – counsel to indicate whether they felt it was appropriate and that you did feel it was appropriate, as well as Mr. Ackerman? While you are thinking about it, is it also fair to say that you are the source of some of the information upon which the security decisions have been made?

MS. MANDELL [sic]: Your Honor, I can't comment on that in open court. I have no objections to the fact – I understand the reasons for the security. . . .

(Verbatim Report of Proceedings, Vol. A, page 33.)

This colloquy shows that defense counsel was aware of the reasons for the court taking security precautions. While this court finds nothing in the record to support the conclusion that the defendant appeared in the courtroom and before the jury in handcuffs, the state court of appeals considered this issue and in its unpublished opinion found the following:

> A criminal defendant has a constitutional right to appear before a jury free of shackles, unless some impelling necessity demands restraint. *State v. Breedlove,* 79 Wash.App. 101, 114, 900 P.2d 586 (1995). Here, before trial, the court judge conferred in camera with defense counsel, the prosecutor, and Tacoma Police

> officers to discuss security measures for the trial. During these discussions, the court was informed of an alleged plan by Powell's brother, Teddy Powell, to "break out Jerome Powell during the course of the trial because 'Jerome Powell was not going back to prison.'" In addition, as deputy prosecutor Ackerman states in his declaration, the police strongly urged the judge, attorneys, and other courtroom personnel to wear bullet proof vests during the trial because "there was cause for serious concern." Defense counsel did not object to shackling Powell for the trial. Under the circumstances presented to the court, counsel's consent to shackling Powell before the jury was not objectively unreasonable and this argument fails.

(Dkt. #2, Exhibit 2, page 12.)

Petitioner has failed to show that the ruling of the state court of appeals on this issue was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. In fact, the expanded record now supports the decision of the state court of appeals and shows that counsel, after in camera discussion, made no objections regarding security issues. Counsel has failed to how trial counsel acted unreasonably. This issue is without merit and should be ***DISMISSED***.

4. Pre trial motions to exclude evidence.

This argument was not raised in the petitioners [sic] 1996 personal restraint petition before the court of appeals. A challenge to the admission of autopsy photographs

was made but the issue there was the admissibility of the evidence, not ineffective assistance of counsel. (Dkt. # 21, Exhibit 3, argument section 1). Now the argument is that counsel was ineffective in not moving to exclude everything except the following facts:

1. A group of people were together on August 4th, 1979.
2. Charles Alison [sic] threatened to take Carol Ngirmekur's baby.
3. There were [sic] "discussion" with Mr. Alison and he was warned to leave the baby alone.
4. The defendant wrestled with the victim in defending Carol Ngirmekur.
5. Mr. Alison was hit on the head.
6. Mr. Alison was later found in the Green River Area.

(Dkt. # 2, page 24).

When the Ninth Circuit remanded this case it stated "[t]herefore, to the extent that Powell's federal claims were contained in his personal restraint petition filed in 1996. Powell has exhausted his state remedies." *Powell v. Lambert,* 357 F. 3rd 871, 880 (9th Cir. 2004) [sic] This claim as not in the 1996 petition and will not be considered by this court.

5. Route to the murder scene.

Petitioner argues that trial counsel was ineffective in not investigating and proving the route taken to the murder scene. The state court of appeals was presented with this issue and held:

5. Investigation of Route to Murder Scene

> Powell next asserts his trial counsel acted deficiently in failing to investigate the route Powell allegedly took to the murder scene. Powell maintains that trial counsel would have discovered information leading to impeachment of one of the State witnesses. Powell also maintains that he had an alibi.
>
> The presumption of effective assistance may be overcome if counsel failed to sufficiently investigate the facts in preparing for trial. *State v. Maurice*, 79 Wash.App. 544, 552, 903 P.2d 514 (1995). In the present case, the evidence before the court did not conclusively establish the route to the murder scene or the duration of travel. Witnesses gave varying accounts of the route and the time traveled between Tacoma and the murder scene. Therefore, even if Powell's counsel had investigated Powell's route, such investigation would not have conclusively established the route or time. Even assuming, as Powell submits, that the investigation would have further corroborated his account, this evidence would have been compared with other accounts by other witnesses. It cannot be said that the failure to investigate the route was deficient or that it prejudiced Powell's defense such that the trial's outcome would have been different.

(Dkt. # 21, Exhibit 2, pages 9 and 10.)

Review of the testimony shows the state courts [sic] of appeals decision to be factually correct. In the habeas petition now before the court the petitioner does not argue why the state court's ruling is contrary to clearly established law. Indeed, the argument made is that failure to investigate is "per se" ineffective assistance of counsel.

While this may be true of a complete failure to investigate, it is not a correct assertion as to the facts of this case. Petitioner fails to show the ruling of the state court of appeals was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. This issue should be **DISMISSED**.

C. Petitioner was limited in the evidence he could present in the state superior court reference hearing regarding the cause of the victim's death.

Petitioner complains that the reference hearing was limited to cause of death and destruction of evidence. The chief complaint is that defense counsel was prevented from exploring evidence that trial counsel was ineffective. (Dkt. # 2). This issue was not contained in the 1996 personal restraint petition and therefore will not be considered. *Powell v. Lambert*, 357 F.3rd 871, 880 (9th Cir. 2004).

CONCLUSION

This petition for writ of habeas corpus should be **DENIED** for the reasons stated above. A proposed order accompanies this Report and Recommendation.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the

clerk is directed to set the matter for consideration on **April 22nd 2005,** as noted in the caption.

DATED this 18th day of March, 2005.

s/ Karen L. Strombom
Karen L Strombom
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEROME POWELL, Petitioner-Appellant, v. JOSEPH D. LEHMAN, Respondent-Appellee.	No. 05-35532 D.C. No. CV-00-05672-RJB Western District of Washington, Tacoma ORDER (Filed Jun. 14, 2006)

Before: CANBY, GOULD, and BEA, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.